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Plaintiffs Hanmi USA, Inc., Hanmi
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Ltd.*

**IN THE UNITED STATES DISTRICT COURT
THE DISTRICT OF NEW JERSEY**

ASTRAZENECA AB, AKTIEBOLAGET
HÄSSLE, ASTRAZENECA LP, KBI INC.,
and KBI-E INC.,

Plaintiffs and
Counterclaim Defendants,

v.

HANMI USA, INC., HANMI
PHARMACEUTICAL CO., LTD., HANMI
FINE CHEMICAL CO., LTD, and HANMI
HOLDINGS CO., LTD.,

Defendants and
Counterclaim Plaintiffs.

Civil Action No. 11-760 (JAP)(TJB)

**Hanmi's Motion *in Limine* No. 1
(To Preclude Testimony of Judi Weissinger and
Motion to Strike Weissinger Report)**

Hanmi hereby moves *in limine* to preclude the alleged testimony of Judi Weissinger and to strike her expert report served on April 25, 2013. Ms. Weissinger was among the witnesses identified on AstraZeneca's witness list on April 19, 2013. On April 25, 2013, AstraZeneca served an expert report of Ms. Weissinger, which offers purported opinions never previously disclosed to Hanmi.

Pursuant to the Court's February 8, 2013 Order, the parties' opening expert reports were due February 19, 2013, rebuttal reports were due March 25, 2013, reply reports were due April 8, 2013 (D.I. 272). Despite knowing that it might seek testimony from Ms. Weissinger many months ago (*see, e.g.*, Ex. 1, AstraZeneca's Responses and Objections to Hanmi's First set of Interrogatories, dated November 30, 2012, at pp. 41-42), AstraZeneca elected not to provide an expert report from Ms. Weissinger according to the operative case schedule. Instead, belatedly and without notice or explanation to Hanmi and without seeking permission from the Court to serve a late report, AstraZeneca simply emailed a report to Hanmi's counsel on April 25, 2013 – over two months after opening expert reports were due, a month after rebuttal reports were due and six days after the close of expert discovery per the Court's February 8, 2013 Order (D.I. 272).

The Federal Rules of Civil Procedure specify the consequence for such failure to timely disclose: “[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, ***unless the failure was substantially justified or is harmless.***” Fed. R. Civ. P. 37(c)(1) (emphasis added); *see Allen v. Parkland School Dist.*, 230 Fed. Appx. 189, 195 (3d Cir. 2007) (affirming grant of motion in limine to exclude expert testimony disclosed after

scheduling order deadline); *Konstantopoulos v. Westvaco Corp.*, 112 F.3d 710, 719-20 (3d Cir. 1997) (affirming exclusion of expert testimony disclosed after scheduling order deadline); *Roberts v. U.S. Postal Service*, 2012 U.S. Dist. LEXIS 86762, *9-18 (D.N.J. June 22, 2012) (granting motion to strike expert witnesses disclosed after scheduling order deadline); *Bouder v. Prudential Financial, Inc.*, 2010 U.S. Dist. LEXIS 51599, *23-29 (D.N.J. May 21, 2010) (granting motion to late-disclosed expert report and to preclude expert testimony); *Pfizer, Inc. v. IVAX Pharms., Inc.*, 2009 U.S. Dist. LEXIS 54910, *8-15 (D.N.J. June 29, 2009) (denying motion for leave five weeks before trial date to permit testimony of expert).

Here, the Court should preclude Ms. Weissinger's testimony at trial. Regardless of her qualifications or expertise, "trial by ambush" should not be countenanced. Expert discovery is largely complete, trial is scheduled to commence on May 21, 2013 and counsel are involved in intensive pretrial preparations. To permit the disclosure of an additional expert witness for trial well beyond the dates ordered by the Court and only weeks before the commencement of trial undermines the integrity of the judicial process, and would severely prejudice Hanmi. *See, e.g., Konstantopoulos*, 112 F.3d at 721 ("Konstantopoulos would have gained a valuable tactical advantage by requiring Westvaco to focus its litigation resources on these efforts in the last days before trial."). AstraZeneca cannot show that its belated disclosure of Ms. Weissinger is substantially justified or harmless – a burden which AstraZeneca has ignored and not even attempted to meet. And, fundamentally, AstraZeneca cannot meet its burden, particularly given that in its November 2012 interrogatory responses it cited previous testimony of Ms. Weissinger in other proceedings (Ex. 1 at pp. 41-42) and, accordingly, knew that it might seek testimony from Ms. Weissinger at least five months ago. Although explicit findings of bad faith are not

required to exclude untimely expert disclosures (*see, e.g., Roberts*, 2012 U.S. Dist. LEXIS 86762 at *17), “violations of scheduling orders coupled with unsatisfactory explanations ‘may be characterized fairly as a willful and bad faith breach.’” *See Pfizer*, 2009 U.S. Dist. LEXIS 54910 at *16 n.12 (quoting *Exxon Corp. v. Halcon*, 156 F.R.D. 589, 592 (D.N.J. 1994)).

A party cannot blatantly ignore the case deadlines, belatedly serve expert reports, not seek permission from the Court, and then at the last minute after the close of expert discovery simply serve a new expert witness report and expect to adduce the expert’s testimony at trial. Even if the parties are able to arrange the deposition of such a witness, to permit these tactics on the eve of trial would be contrary to and violate the Federal Rules of Civil Procedure and this Court’s scheduling orders, create uncertainty in the proceedings and cause undue prejudice to Hanmi in what is designed to be an orderly and fair pretrial process. *See, e.g., Roberts*, 2012 U.S. Dist. LEXIS 86762 at *16 (“Parties are entitled to some certainty as they prepare for trial, and if “newly designated experts . . . [are] permitted . . . without limitation, the need for discovery could be endless.”) (quoting *Exxon*, 156 F.R.D. at 591).

Ms. Weissinger’s untimely report should be stricken and her testimony at trial precluded for at least the reasons stated above.

Dated: April 29, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2013, I caused a copy of the foregoing **Hanmi's Motion in Limine No. 1 (To Preclude Testimony of Judi Weissinger and Motion to Strike Weissinger Report)** to be served upon the following counsel by electronic mail:

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